RECORD AND BRIEFS

Nos. 13-354 & 13-356

In The
Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

HOBBY LOBBY STORES, INC., ET AL.,

Respondents.

CONESTOGA WOOD SPECIALTIES CORP., ET AL.,

Petitioners,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Courts Of Appeals For The Tenth And Third Circuits

BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF GOSPEL RESCUE MISSIONS, PRISON FELLOWSHIP MINISTRIES, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, NATIONAL ASSOCIATION OF EVANGELICALS, ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE, THE C12 GROUP AND CHRISTIAN LEGAL SOCIETY IN SUPPORT OF GRANTING THE PETITIONS

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QUESTION PRESENTED

The Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, provides that the government "shall not substantially burden a person's exercise of religion" unless that burden satisfies strict scrutiny. *Id.* § 2000bb-1(a), (b). Respondents are a family and their closely held businesses, which they operate according to their religious beliefs. A regulation under the Patient Protection and Affordable Care Act requires Respondents to provide insurance coverage for all FDA-approved "contraceptive methods [and] sterilization procedures." 42 U.S.C. § 300gg-13(a)(4); 76 Fed. Reg. 46621, 46626 (Aug. 3, 2011). Respondents' sincere religious beliefs prohibit them from covering four out of twenty FDA-approved contraceptives in their self-funded health plan. If Respondents do not cover these contraceptive methods, however, they face severe fines.

The question presented is whether the regulation violates RFRA by requiring Respondents to provide insurance coverage for contraceptives in violation of their religious beliefs, or else pay severe fines.

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INTEREST OF *AMICI CURIAE*[1]

The **Association of Gospel Rescue Missions** ("AGRM") was founded in 1913 and has grown to become North America's oldest and largest network of independent crisis shelters and recovery centers offering radical hospitality in the name of Jesus. Last year, AGRM-affiliated ministries served nearly 42 million meals, provided more than 15 million nights of lodging, bandaged the emotional wounds of thousands of abuse victims, and graduated over 18,000 individuals from addiction recovery programs. The ramification of their work positively influences surrounding communities in countless ways.

The first U.S. gospel rescue mission was founded in New York City in the 1870s and has continuously operated as a Christian ministry to the poor and addicted in the Bowery for 134 years. During that time, generations of men and women have followed their Christian calling to found gospel rescue missions and minister to the needs of the hungry, homeless, abused, and addicted in cities and small communities across America. This calling is inseparable from and

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[1] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* and their counsel, make a monetary contribution to the preparation or submission of this brief. The parties consented to this filing. Their letters of consent are on file with the Clerk. As required by Rule 37.2(a), counsel for *amici curiae* provided timely notice of the intent to file this brief to all parties' counsel of record.

an outward sign of their faith, as *James* 2:14-17 teaches:

> What good is it, my brothers, if someone says he has faith but does not have works? Can that faith save him? If a brother or sister is poorly clothed and lacking in daily food, and one of you says to them, "Go in peace, be warmed and filled," without giving them the things needed for the body, what good is that? So also faith by itself, if it does not have works, is dead.

Prison Fellowship Ministries ("PFM") is the largest prison ministry in the world and partners with thousands of churches and tens of thousands of volunteers to care for prisoners, former prisoners, and their families, regardless of their religious beliefs or lack thereof. With one-on-one mentoring, in-prison seminars and various post-release initiatives, PFM uses religious-based teachings to help guide prisoners when they return to their families and society, and thereby contributes to restoring peace in those communities most endangered by crime.

The **Association of Christian Schools International** is a non-profit, non-denominational, religious association that serves nearly 24,000 Christian schools that educate nearly 5.5 million children in over 100 countries, including nearly 3,800 Christian preschools, elementary, and secondary schools and over 100 post-secondary institutions in the United States.

The **National Association of Evangelicals** ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent

ministries in the United States. It serves 41 member denominations, as well as numerous evangelical associations, missions, non-profits, colleges, seminaries and independent churches. NAE serves as the collective voice of evangelical churches and other religious ministries. It believes that human life is sacred, that civil government has no higher duty than to protect human life, and the duty is particularly applicable to the life of unborn children because they are helpless to protect themselves.

The **Ethics & Religious Liberty Commission** ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 46,000 autonomous churches and nearly 16 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as freedom of speech, religious freedom, marriage and family, the sanctity of human life, and ethics. Religious freedom is an indispensable, bedrock value for Southern Baptists. The Constitution's guarantee of freedom from governmental interference in matters of faith is a crucial protection upon which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience in the practice of their faith.

The **Institutional Religious Freedom Alliance** ("IRFA"), founded in 2008, works to protect the religious freedom of faith-based service organizations through a multi-faith network of organizations to educate the public, train organizations and their lawyers, create policy alternatives that better protect

religious freedom, and advocate to the federal administration and Congress on behalf of the rights of such faith-based services.

The **Christian Legal Society** ("CLS") is a non-profit, non-denominational association of Christian attorneys, law students, and law professors, with chapters in nearly every state and on many law school campuses. CLS's legal advocacy division, the Center for Law & Religious Freedom, acts to protect all religious citizens' right to be free to exercise their religious beliefs. CLS also offers its members opportunities to provide legal aid to those who cannot afford legal services, regardless of the clients' faith or lack thereof.

The C12 Group is a fee-for-service organization that serves and equips Christian chief executives with more than 1250 members across 30 American states. The C12 Group is distinctive in that it combines business/leadership best practices and MBA-level content from a Biblical worldview perspective to help its members build thriving platforms for ministering to the thousands of stakeholders that a typical, established, small-to-midsized business serves each year. More than ninety percent of The C12 Group's clients are privately-held family businesses run by individuals who view themselves as tending to God's companies as stewards and, therefore, operate according to core principles informed by their deeply-held Christian faith. The HHS Mandate is broadly objectionable to the overwhelming majority

of its members as a violation of their Christian consciences.

SUMMARY OF ARGUMENT

Amici share a deep and abiding commitment to religious liberty, not just for themselves, but for Americans of all faith traditions. In the specific context of the HHS Mandate, *amici* may differ in their views regarding the morality of promoting the use of contraceptives in general, or of emergency contraceptives in particular. *Amici*, however, believe that our Nation's historic, bipartisan commitment to religious liberty requires that the government respect the religious beliefs of those faith traditions whose religious beliefs prohibit participating in, funding, or otherwise facilitating the use of contraceptives generally, or abortion-inducing drugs specifically. The Mandate sharply departs from the Nation's bipartisan tradition of respect for religious liberty, especially its deep-rooted protection of religious conscience in the context of abortion.

This brief makes two distinct points. First, *amici* believe that religious liberty protects the individual religious owners and their businesses in both these cases. Christian theology teaches that Christians' faith necessarily should influence how they work because "[w]hatever you do, work at it with all your

heart, as working for the Lord, not for men." *Colossians* 3:23.[2] To this end, several of the *amici* have as a primary purpose to assist their members with the integration of their faith and work.[3]

Second, *amici* agree that the Mandate's exemption for a small subset of religious employers is completely inadequate to protect religious liberty. Until the Mandate, *amici* and organizations like them – religious educational institutions and religious social service providers to society's most vulnerable – epitomized the quintessential "religious employer."

But the Mandate unilaterally re-defined most religious employers to be non-religious employers. By administrative fiat, the Mandate deprived religious educational institutions, hospitals, associations, and charities of their religious liberty. Only churches, their integrated auxiliaries, conventions or associations of churches, or religious orders' exclusively religious activities fall within the Mandate's exemption for religious employers. 78 Fed. Reg. 39870 (published July 2, 2013). Many, if not most, religious educational

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[2] Quotations are from the New International Version of *The Bible*.

[3] In speaking of the Christian tradition regarding faith and work, *amici* in no way imply that other faiths do not have their own religious convictions regarding faith and work that are to be respected. *Amici* are simply addressing their faith's teaching. Also, when speaking in terms of religious liberty, "church" should be taken to include other faiths' places of worship. *See generally*, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S.Ct. 694 (2012).

institutions and religious ministries do not qualify for the exemption. The many religious ministries that are independent of, and unaffiliated with, any specific church are not exempt under the government's impoverished, one-size-fits-all misconception of "religious employer."

Those religious organizations that fall outside of the Mandate's crabbed definition of "religious employer" are forced into a so-called "accommodation" that violates, rather than respects, their religious liberty. Under the so-called accommodation, the government requires religious organizations to facilitate access to the objectionable drugs through their insurers or third party administrators contrary to their sincerely held religious convictions. Indeed, some of the insurers and third party administrators are themselves religious organizations who cannot in good conscience comply with the Mandate.

The government's insistence that religious organizations are not buying objectionable insurance because the government asserts that contraceptive coverage will be "cost-neutral" does not accord with economic, legal, or moral reality. Moreover, in light of the bureaucratic expense and waste that implementation of the "accommodation" will necessarily create for the government and religious organizations, as well as insurers and third-party administrators, it would be more economical and efficient for the government itself to provide contraceptives through direct distribution, tax credits, or other government means.

At the end of the day, this case is not about whether contraceptives will be readily available – access to contraceptives is plentiful and inexpensive – but whether America will remain a pluralistic society that sustains a robust religious liberty for Americans of all faiths. Both the Religious Freedom Restoration Act and the First Amendment require that the government respect religious liberty by protecting all entities with sincerely held religious convictions from providing, or otherwise enabling, the objectionable coverage.

ARGUMENT

I. Christian Theology Teaches that Christians' Faith Necessarily Should Influence Their Work.

The government's argument that religious persons forfeit their free exercise of religion when they enter the marketplace brushes aside two millennia of Christian teaching. The great Christian thinkers historically have urged Christians to incorporate into their daily work the profound conviction that their mundane work matters to God. More than simply earning a living, work is a calling, a vocation, intended to honor God. Contemporary Christian writers continue to invite modern Christians to live lives of integrity in which their workday lives reflect their religious convictions and thereby honor God.

Jesus Himself taught His disciples that how they handled their material possessions was important to God. For example, in the "Parable of the Rich Fool," Jesus told of a prosperous farmer who decided to build bigger barns to store his goods so that he could "[t]ake life easy; eat, drink and be merry," only to be told by God that "[t]his very night your life will be demanded from you." According to Jesus, the parable taught "how it will be with anyone who stores up things for himself but is not rich toward God." *Luke* 12:13-21. Or consider Zaccheus, who had gained great wealth through his career as a chief tax collector. After Jesus visited him, Zaccheus announced that he would repay anyone he had cheated "four times the amount" and give half of his possessions to the poor. *Luke* 19:1-9.[4]

The importance of having a proper understanding of work and its importance to God is deeply rooted in Christian theology. Scripture instructs that "[w]hatever you do, work at it with all your heart, as working for the Lord, not for men." *Colossians* 3:23. *See also, I Corinthians* 10:31.

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[4] Tax collectors and soldiers likewise understood that their spiritual conversion should affect their job performance. In response to their queries, John the Baptist told the tax collectors not to collect any more than they were required to collect in taxes and instructed the soldiers not to extort money, accuse people falsely, or be discontent with their pay. *Luke* 3:13-14.

Pope John Paul II declared:

> The vocation of the lay faithful to holiness implies that life according to the Spirit expresses itself in a particular way in their *involvement in temporal affairs* and in their *participation in earthly activities*. Once again the apostle admonishes us: "Whatever you do, in word or deed, do everything in the name of the Lord Jesus, giving thanks to God the Father through him" (*Col.* 3:17). Applying the apostle's words to the lay faithful, the Council categorically affirms: "Neither family concerns nor other secular affairs should be excluded from their religious programme of life." Likewise the Synod Fathers have said: "The unity of life of the lay faithful is of the greatest importance: *indeed they must be sanctified in everyday professional and social life*. Therefore, to respond to their vocation, the lay faithful must see their daily activities as an occasion to join themselves to God, fulfill his will, serve other people and lead them to communion with God in Christ.

Apostolic Exhortation on the Lay Faithful, Chap. 1, n. 17 (1988) (original emphasis), *available at* http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/document/hf_jp_iiexh_30121988_christifideles-laici_en.html (last visited Oct. 21, 2013).

John Calvin set forth a Christian understanding of work as a God-given calling:

> [T]he Lord enjoins every one of us, in all the actions of life, to have respect to our own

> calling. . . . [I]t is enough to know that in everything the call of the Lord is the foundation and beginning of right action. He who does not act with reference to it will never, in the discharge of duty, keep the right path. . . . This, too, will afford admirable consolation, that in following your proper calling, no work, will be so mean and sordid as not to have a splendor and value in the eye of God.

John Calvin, *Institutes of the Christian Religion*, III.X.6 (Henry Beveridge, trans.) (1845).

Martin Luther likewise "rejected the division between sacred and secular spheres" and "broadened the concept of vocation from a narrow ecclesiastical focus to describe the life and work of all Christians in response to God's call." Kathryn Kleinhans, *The Work of a Christian: Vocation in Lutheran Perspective, in Word & World*, Vol. 25, No. 4 at 394, 396 (Fall 2005) (pub. Lutheran Seminary, St. Paul, Minn.). Thus, "[s]een through the lens of vocation, all human work becomes a means to participate in God's creating and sustaining activity on earth." *Id.* at 396. In Luther's own words, "[e]very occupation has its own honor before God, as well as its own requirements and duties." *Id.*, *quoting* Martin Luther, "A Sermon on Keeping Children in School" (1530), *in Luther's Works*, 55 vols., ed. Jaroslav Pelikan and Helmut

Lehmann (Philadelphia and St. Louis: Fortress and Concordia, 1955-1986) 46:246.

Echoing this concept of vocation, C. S. Lewis, perhaps the most widely read twentieth-century Christian writer, urged that:

> The work of a Beethoven, and the work of a charwoman, become spiritual on precisely the same condition, that of being offered to God, of being done humbly "as to the Lord". . . . We are members of one body, but differentiated members, each with his own vocation.

C. S. Lewis, "Learning in War-Time" *in The Weight of Glory* 55-56 (Harper Collins 2001). Lewis observed that "Christianity does not simply replace our natural life and substitute a new one: it is rather a new organization which exploits, to its own supernatural ends, these natural materials. . . . There is no essential quarrel between the spiritual life and the human activities as such." *Id.* at 54-55.

A leading contemporary evangelical pastor, Timothy Keller of Redeemer Presbyterian Church in New York City, devoted an entire book to the topic of faith and work. In *Every Good Endeavor*, Keller posits that God "gives us a clear purpose for our work and faithfully calls us into it." Timothy Keller & Katherine Leary Alsdorf, *Every Good Endeavor* 63 (2012). "Our daily work can be a calling only if it is reconceived as God's assignment to serve others. And that is exactly how the Bible teaches us to view

work." *Id.* at 66. In order to "ma[k]e vocational discipleship – helping people integrate their faith and work – a major focus of its overall ministry," Redeemer Presbyterian Church has established a Center for Faith and Work. *Id.* at 242-253. *See* http://www.faithandwork.org/. Many such Christian institutes are exploring the blend of faith and work.

Similarly, *amicus* The C12 Group assists Christian business leaders to apply biblical standards in their daily work. *Amicus* Christian Legal Society challenges attorneys to integrate their faith and legal practice. *See generally*, Michael P. Schutt, *Redeeming Law: Christian Calling and the Legal Profession* (2001). *See also*, Michael W. McConnell, Robert F. Cochran, Jr., and Angela C. Carmella, *Christian Perspectives on Legal Thought* (Yale University 2001). Many other professional organizations also focus on the integration of faith and work. *See*, *e.g.*, Gene Rudd, M.D. (Senior Vice President of Christian Medical and Dental Associations), and Alan Weir, M.D., *Practicing by the Book: A Christian Doctor's Guide to Living and Serving* (2005).

The family owners of Hobby Lobby, Mardel, and Conestoga Wood Specialties are living consistently with two millennia of teaching that one's faith necessarily should influence one's work. The government's arbitrary line-drawing between non-profit and for-profit work disregards orthodox Christian doctrine regarding the duty to honor God through one's work.

II. The Mandate Fails to Protect the Religious Liberty of Both For-Profit Businesses and Non-Profit Religious Organizations.

While both of these cases involve for-profit businesses owned by religious individuals, the Mandate's suppression of religious liberty extends to non-profit religious organizations. The Mandate infringes the religious liberty of non-profit religious organizations in at least two basic ways: 1) a too narrow exemption for churches but not other religious organizations and 2) a so-called accommodation that promotes the Mandate's unconstitutional requirement that religious organizations facilitate access to drugs which violate their religious convictions. While the exemption and accommodation are not at issue in cases involving for-profits, it is important that the Court understand the coercive impact of the Mandate, as well as the inadequacy of the exemption and so-called accommodation, vis-à-vis religious non-profits' right to freely exercise their religious beliefs.

The Court's resolution of cases involving for-profits necessarily will affect non-profit religious organizations. There is no substantive difference between the Mandate's practical impact on for-profits and non-profit religious organizations. As explained below, despite the so-called accommodation and the too narrow exemption for religious employers, non-profit religious organizations are still required by the Mandate to facilitate access to drugs that violate their religious beliefs. Furthermore, the analyses of the Mandate's substantial burden and the resulting

strict scrutiny for religious non-profit organizations likely will parallel those analyses for religious owners and their businesses. As a result, granting the petitions and eventually ruling in favor of Hobby Lobby, Mardel, and Conestoga Wood Specialties and their owners will greatly increase the likelihood that non-profit religious organizations will also secure their religious liberty.

A. The majority of religious employers are not covered by the Mandate's excessively narrow exemption for "religious employers."

For two years, a multitude of religious organizations have unsuccessfully sought a definition of "religious employer" that respects all faith communities' religious liberty. But for two years, the government has seemed bent on casting the narrowest net possible in order to protect the fewest religious employers possible.

The Mandate leaves any exemption for religious organizations entirely to the discretion of the Health Resources and Services Administration (HRSA) of the Department of Health and Human Services. 76 Fed. Reg. 46221, 46623 (published Aug. 3, 2011). In August 2011, HRSA issued a "religious employer" exemption that protects only a severely circumscribed subset of religious organizations. *Id.* at 46623; 45 C.F.R. § 146.130. To qualify as a "religious employer" for purposes of the exemption, a religious organization was required to: 1) inculcate values as its purpose;

2) primarily employ members of its own faith; 3) serve primarily members of its own faith; and 4) be an organization as defined in Internal Revenue Code § 6033(a)(1) or § 6033(a)(3)(A)(i) or (iii). 45 C.F.R. § 147.130(a)(1)(iv)(B).[5] The fourth criteria refers only to churches, their integrated auxiliaries, associations or conventions of churches, or exclusively religious activities of religious orders.

The exemption failed to protect most religious employers, including colleges, schools, hospitals, homeless shelters, food pantries, health clinics, and other religious organizations. This failure was intentional. HRSA itself stated that its intent was "to provide for a religious accommodation that respects the unique relationship between *a house of worship and its employees in ministerial positions*." 76 Fed. Reg. at 46623. *See also*, 77 Fed. Reg. 16501, 16502 (published Mar. 21, 2012).

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[5] HHS reached for a controversial definition of "religious employer" that it knew was highly problematic for religious charities. Used by only three states, the definition had twice been challenged in state courts. *Catholic Charities v. Superior Court*, 85 P.3d 67 (Cal. 2004); *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006). That these state mandates had been challenged by Catholic Charities as a violation of their religious liberty indicates that HHS officials necessarily knew the exemption would be unacceptable to many religious organizations. But at least religious organizations could avoid state contraceptive mandates by utilizing federal ERISA strategies, an option unavailable under the federal Mandate.

Similarly, on April 8, 2013, Secretary Sebelius said:

> Churches and church dioceses as employers are exempted from this benefit. *But Catholic hospitals, Catholic universities, other religious entities will be providing coverage to their employees starting August 1st.* . . . [A]s of August 1st, 2013, every employee who doesn't work directly for a church or a diocese will be included in the benefit package.

The Forum at Harvard School of Public Health, A Conversation with Kathleen Sebelius, U.S. Secretary of Health and Human Services, Apr. 8, 2013, *available at* http://theforum.sph.harvard.edu/events/conversation-kathleen-sebelius/ (at 48-53 min.) (last visited Oct. 21, 2013) (emphasis added).

Until the Mandate, religious educational institutions and religious charities that serve society's most vulnerable epitomized "religious employers." But the Mandate transformed the majority of religious employers into nonreligious employers.

Forty-four Protestant, Jewish, and Catholic organizations immediately sent a letter to HHS explaining why the proposed definition was unacceptably narrow. Their criticism of the exemption was two-fold. First, the definition of "religious employer" was unacceptably narrow. Even some houses of worship failed to qualify for the exemption because of its peculiar design. To qualify as a "religious employer," a house of worship would have to serve primarily persons of the

same faith. But many houses of worship, as well as many religious charities, would consider it a violation of their core religious beliefs to turn away persons in need because they did not share their religious beliefs.

Second, the Mandate's definition of "religious employer" created a two-class bifurcation among religious organizations.[6] In a letter to the HHS Secretary, one hundred twenty-five religious organizations also objected to the government's attempt to divide the religious community into two classes: "churches – considered sufficiently focused inwardly to merit an exemption and thus full protection from the mandate; and faith-based service organizations – outwardly oriented and given a lesser degree of protection." The letter reasoned:

> [B]oth worship-oriented and service-oriented religious organizations are authentically and equally religious organizations. To use Christian terms, we owe God wholehearted and pure worship, to be sure, and yet we know also that "pure religion" is "to look after orphans and widows in their distress" (*James* 1:27). We deny that it is within the jurisdiction of the federal government to define,

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[6] *See* Letter to Joshua DuBois, Director of The White House Office of Faith-based and Neighborhood Partnerships, from Stanley Carlson-Thies, Institutional Religious Freedom Alliance, August 26, 2011, *available at* http://www.clsnet.org/document.doc?id=322 (last visited Oct. 21, 2013).

> in place of religious communities, what constitutes both religion and authentic ministry.[7]

The Council for Christian Colleges & Universities, for example, also expressed its objections to a two-tier exemption in a letter to President Obama on behalf of its 138 member and affiliate schools.[8]

Nonetheless, over the sustained protest of wide swaths of the religious community, the government codified the excessively narrow definition of "religious employer" into law. 78 Fed. Reg. 8456 (published Feb. 15, 2012). In July 2013, the definition of "religious employer" for purposes of the exemption was amended by dropping three of the four criteria. 78 Fed. Reg. 39870 (published July 2, 2013). But elimination of the first three criteria failed to resolve the definition's basic defect.

The revised exemption perpetuates the second-class treatment of religious colleges and charities. The government made it clear that its elimination of the first three criteria was not intended to "expand the universe of employer plans that would qualify for

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[7] Letter to Secretary Sebelius from Stanley Carlson-Thies, Institutional Religious Freedom Alliance, and 125 religious organizations, June 11, 2012, *available at* http://www.clsnet.org/document.doc?id=367 (last visited Oct. 21, 2013).

[8] Letter to President Obama from Paul Corts, President, CCCU, March 9, 2012, *available at* http://www.cccu.org/news/articles/2012/CCCU-Sends-New-Letter-to-White-House-Regarding-Contraceptive-Mandate-Accommodation (last visited Oct. 21, 2013).

the exemption." 78 Fed. Reg. at 8458-59. The exemption is still narrowly limited to churches, associations or conventions of churches, integrated auxiliaries, or the exclusively religious activities of religious orders.

Clinging to a definition of "religious employer," the government links a vital religious exemption to provisions of the tax code that have nothing to do with health care or conscience. Many religious organizations do not qualify as "preferred" § 6033 organizations because many faith-based organizations are not formally affiliated with a religious congregation or denomination.[9] Evangelical Christian institutions often are collaborative efforts across numerous denominations and intentionally independent of any specific denomination. The exemption denies religious liberty to religious organizations that have an intentional interdenominational or ecumenical affiliation. Similarly, Catholic organizations often are not formally affiliated with their diocese and also are denied the exemption.[10]

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[9] Numerous leaders of Protestant organizations expressed this concern in a letter to President Obama. Letter to President Obama from Leith Anderson, President, National Association of Evangelicals, *et al.*, December 21, 2011, *available at* http://www.nae.net/resources/news/712-letter-to-president-on-contraceptives-mandate (last visited Feb. 18, 2013).

[10] For example, the Roman Catholic Archdiocese of Washington, D.C., qualifies for the exemption, but the Catholic Charities of the Archdiocese of Washington, the Consortium of Catholic Academies of the Archdiocese of Washington, Archbishop Carroll

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The final definition of "religious employer" actually squeezed the exemption further. Under the February 2012 exemption, a church could plausibly include church-affiliated religious organizations, such as schools and other ministries that did not otherwise qualify for the exemption, in the church's insurance plan. 77 Fed. Reg. 16501, 16502. But the June 2013 regulation forecloses that option by restricting the exemption solely to the qualifying religious employer and not to any affiliated organizations that are covered by its plan. 78 Fed. Reg. 8456, 8467 ("This approach would prevent what could be viewed as a potential way for employers that are not eligible for the accommodation or the religious employer exemption to avoid the contraceptive coverage requirement by offering coverage in conjunction with an eligible organization or religious employer through a common plan.")[11]

To justify its differential treatment between churches and other religious organizations, the government asserts that employees of religious nonprofit organizations are less likely to share their

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High School, and Catholic University of America are not exempt. Despite the exemption, the Archdiocese must either sponsor a health plan that facilitates access to the objectionable drugs for the non-exempt organizations' employees or stop covering these ministries. *See* Motion for Preliminary Injunction at 2, *Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-5091 (D.C. Cir. Aug. 12, 2013).

[11] *See* footnote 10.

employers' religious beliefs than are the employees of a church. Yet no evidence is given for this bald assertion. Given the pay differential between most religious non-profits and other employers, it seems highly likely that employees of religious non-profits share their employers' religious beliefs. That is, persons choose to work for religious non-profits because they agree with their religious employers' mission and, therefore, make the necessary financial sacrifices. For example, teachers at religious schools often accept a lower salary compared to their public school counterparts in order to teach in a school whose mission aligns with their religious beliefs.[12]

Thus the exemption excludes religious ministries that serve as society's safety net for the most vulnerable. Through the exemption, the government has unilaterally re-defined what it means to be a religious organization. Religious organizations that ease government's burden by providing food, shelter, education, and health care for society's most vulnerable are rewarded with a government mandate that assails their conscience rights.

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[12] According to *amicus* Association of Christian Schools International's annual survey of its members, in December 2012, an ACSI-member K-12 teacher with a Master's degree earned $32,000 (national average) while a similar public school teacher earned $51,000. *See* http://www.acsiglobal.org/acsi-2012-13-school-survey (last visited Oct. 21, 2013).

B. The so-called accommodation compels non-profit religious organizations to provide access to drugs that violate their religious beliefs.

The so-called accommodation fails to offer adequate religious liberty protection for non-profit religious organizations. Instead, the so-called accommodation coerces religious organizations to facilitate access to drugs to which they have religious objections.

Despite widespread protest from the religious community, the government codified the so-called accommodation for non-exempted, non-profit religious organizations. 78 Fed. Reg. 39870, 39874, 39877-78 (published July 2, 2013). A non-profit organization that holds itself out as a religious organization is eligible for the accommodation if it "[o]pposes providing coverage for some or all of the contraceptive services required." *Id.* at 39874. But by delivering its self-certification that it is eligible for the accommodation to its insurer or a willing third party administrator, the religious organization itself triggers the provision of abortion-inducing drugs to its employees and their beneficiaries. 78 Fed. Reg. at 39892-93.

Essentially, the so-called accommodation requires a religious organization with religious objections to covering drugs that violate its sincerely held religious convictions to identify an insurer, or a willing third-party administrator, which the government then requires to pay the costs of contraceptive coverage without any cost-sharing by the employees and

(supposedly) without higher premiums charged to the religious organizations. 78 Fed. Reg. 39870 (published July 2, 2013).

The so-called accommodation fails on multiple levels. First, the religious organization's insurance plan remains the conduit for delivering drugs that violate the organization's religious beliefs. No employee or beneficiary receives the objectionable drugs unless they are enrolled in the religious organization's health insurance plan. When an employee leaves the plan, access to the objectionable drugs ceases.

Second, a religious objection to taking human life is not satisfied by hiring a third-party who is willing to do the job. At bottom, that is the essence of the so-called accommodation. Because, and only because, the religious organization provides insurance are the objectionable drugs made available to the organization's employees.[13]

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[13] For example, East Texas Baptist University and Houston Baptist University have filed suit challenging the Mandate because they have religious objections to providing coverage for abortion-causing drugs themselves or through a third-party. *East Texas Baptist University, et al. v. Sebelius, et al.*, No. 4:12-cv-03009, Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment and Preliminary Injunction at 20 (S.D. Tex. Aug. 30, 2013) (discussing why the so-called accommodation violates the religious organizations' religious beliefs that prohibit "soliciting, contracting with, or designating a third party to provide these drugs"). *See also, Southern Nazarene University, et al. v. Sebelius, et al.*, No. 5:13-cv-01015-F, Complaint ¶¶ 5-7 (W.D.

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Third, the government's assurances – that the so-called accommodation places real distance between religious organizations and access to the objectionable drugs – are hollow. Such assurances rest on the unconstitutional premise that the government, rather than the religious organizations, determines when the distance is adequate to satisfy the organizations' religious consciences. But the government has it backwards: the religious organizations, not the government, determine the distance necessary. *See Thomas v. Review Bd.*, 450 U.S. 707, 715 (1981) ("Thomas drew a line and it is not for us to say that the line he drew was an unreasonable one.").

Fourth, the so-called accommodation provides no credible means for covering the cost of the objectionable drugs absent the employers' premiums. Even were the coverage "cost-neutral" over a span of years, as the government claims, the up-front costs would be significant and would need to be paid now. 78 Fed. Reg. at 39877-78. The government offers insurers two modest proposals: 1) "set the premium . . . as if no payments for contraceptive services had been provided to plan participants," or 2) "treat the cost of payments for contraceptive services . . . as an administrative

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Okla. Sept. 20, 2013) (accommodation "conscripts the Universities into the government's scheme, forcing them to obtain an insurer or third-party administrator to arrange payment for the objectionable drugs, so that such coverage will apply to the Universities' own employees as a direct consequence of their employment with the Universities and of their participation in the health insurance benefits the Universities provide them").

cost that is spread across the issuer's entire risk pool, excluding plans established or maintained by eligible organizations." *Id.* Both proposals lack credibility.

Fifth, the so-called accommodation requires a *self-insured* religious employer to find a third party administrator to provide the drugs, without cost sharing, to its employees and their beneficiaries, even though the religious employer believes it is wrong to facilitate access to those drugs. *Id.* at 39880. A self-insured religious organization must provide the names of its employees to a third party administrator. The religious organization must constantly coordinate with the third party administrator to update the list of plan participants when employees leave the organization or new employees are hired. 78 Fed. Reg. 39876. The religious organization must coordinate with the third-party administrator when notices are sent. *Id.*

At bottom, the government's insistence that religious organizations are not buying objectionable insurance because the government deems contraceptive coverage to be cost-neutral does not deal with economic, legal, or moral reality. Religious organizations that offer health insurance do not pay for individual benefits and products at the time they are dispensed. Instead, the religious organizations pay a premium for a policy that provides access to covered drugs, and that access includes access to the objectionable drugs. Religious organizations are thereby paying an insurer to provide employees with access to

the objectionable drugs contrary to their sincerely held religious beliefs. That is the basic reality.

In light of the bureaucratic expense and waste that implementation of the so-called accommodation will necessarily create for the government and religious organizations, as well as insurers and third party administrators, it clearly would be more economical and efficient for the government itself to provide contraceptives through direct distribution, tax credits, or other government means.

CONCLUSION

A leading religious liberty scholar recently warned: "For the first time in nearly 300 years, important forces in American society are questioning the free exercise of religion in principle – suggesting that free exercise of religion may be a bad idea, or at least, a right to be minimized." Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. Det. Mercy L. Rev. 407, 407 (2011). Religious liberty is among America's most distinctive contributions to humankind. But it is fragile, too easily taken for granted and too often neglected. By sharply departing from our nation's historic, bipartisan tradition of respecting religious conscience, the Mandate poses a serious threat to religious liberty and pluralism.

The petitions for a writ of certiorari should be granted in order to affirm the Tenth Circuit's en banc

ruling in *Hobby Lobby* and reverse the Third Circuit's ruling in *Conestoga Wood Specialties*.

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